

DOCUMENT RESUME

ED 284 437

FL 016 829

TITLE Bilingual Education. Research and Evaluation Contracts. Report to the Chairman, Committee on Education and Labor, House of Representatives.

INSTITUTION General Accounting Office, Washington, D.C.

REPORT NO GAO/HRD-87-64

PUB DATE May 87

NOTE 39p.

AVAILABLE FROM U.S. General Accounting Office, Post Office Box 6015, Gaithersburg, MD 20877 (first five copies are free; additional copies are \$2.00 each, with a 25% discount on orders for 100 or more copies).

PUB TYPE Information Analyses (070) -- Reports - General (140)

EDRS PRICE MF01/PC02 Plus Postage.

DESCRIPTORS *Bilingual Education; *Contracts; *Education Service Centers; Elementary Secondary Education; Evaluation Criteria; *Federal Aid; *Federal Programs; *Federal Regulation; Language Research; Research and Development Centers; *Resource Allocation

ABSTRACT

Results of a review of 34 contracts relating to bilingual education awarded by the Department of Education's Office of Bilingual Education and Minority Languages Affairs and the Office of Planning, Budget, and Evaluation are presented. The review analyzed awards made from 1982 to 1985 and focused on: the extent of and justification for contracts and modifications awarded on a noncompetitive basis; use of task order contracts for bilingual research; extent of and justification for contracts awarded to Small Business Administration firms; contracts awarded during fiscal years 1982-85 and procurement processes; representation on contract proposal review panels and subsequent scoring of contract proposals; role of the Bilingual Research Planning Committee before its termination; modification of terms of a contract request for proposals to operate Multifunctional Resource Centers after its issuance; appropriated funds for bilingual education; and the status of bid protests related to contracts awarded in 1986 for the Multifunctional Resource Centers and the National Clearinghouse for Bilingual Education. With the exception of one contract, no significant deficiencies were found in the Department of Education's awarding and modifying of contracts. (CB)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

GAO

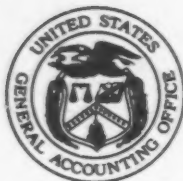
United States General Accounting Office

Report to the Chairman, Committee on
Education and Labor, House of
Representatives

May 1987

BILINGUAL
EDUCATION

Research and
Evaluation Contracts



"PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

Govt.

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

- ☒ This document has been reproduced as
received from the person or organization
originating it.
- ☐ Minor changes have been made to improve
reproduction quality.
- Points of view or opinions stated in this docu-
ment do not necessarily represent official
OERI position or policy.

ED284437

FL016829

Human Resources Division

B-226562

May 18, 1987

The Honorable Augustus F. Hawkins
Chairman, Committee on Education
and Labor
House of Representatives

Dear Mr. Chairman:

In response to your request, we have reviewed research and other contracts relating to bilingual education awarded by the Department of Education's Office of Bilingual Education and Minority Languages Affairs (OBEMLA) and the Office of Planning, Budget and Evaluation (OPBE). Our review was directed toward responding to specific questions you asked concerning awards during fiscal years 1982-85 of bilingual research contracts and modifications to such contracts, as well as contract awards to operate four multifunctional centers and the National Clearinghouse on Bilingual Education.

We reviewed 34 contracts awarded or modified during the 4-year period. The value of these contracts at the time of their award totaled \$14.7 million; as modified, their value had increased to \$37.8 million as of September 30, 1985. Except for modifications to one contract, we did not identify any significant deficiencies in the award of or modifications to these contracts.

Your questions and a summary of our findings and conclusions are presented below. More detailed information on each question is provided in appendix I.

**What Was the Extent of and
Justification for Contracts
and Modifications Awarded
on a Noncompetitive Basis?**

Of the 34 contracts we reviewed, 2 were awarded noncompetitively and 1 was awarded with less than full and open competition. Nine other contracts were modified for work not specifically covered in the original contracts. The value of these contracts totaled \$16.9 million as of September 30, 1985. These awards and modifications were made according to applicable procurement regulations, except for two modifications related to two 1-year extensions of one contract. Of the total contract amount of about \$9.5 million, these modifications were for about \$3.2 million. These were inappropriate because they were based on the exercise of a contract "option" clause that did not, as it should have, include a price that the government could unilaterally elect to accept. Because further negotiation was required, these two modifications were tantamount to a sole-source procurement that the department did not justify.

In commenting on a draft of this report, the department's deputy under secretary for management told us that current awards do not contain provisions that would lead to such modifications. (See app. III.)

Were Task Order Contracts Used for Bilingual Education Research, and Was Their Use Appropriate?

Three of the 34 contracts were task order contracts that were used, in part, to support bilingual education research. This type of contract contains a broadly worded statement of work under which the contractor may be requested to perform studies and analyses related to the work statement. Under the three task order contracts, a total of 60 tasks were performed, only 9 of which related to bilingual education research. As of September 30, 1985, estimated costs incurred for the nine tasks totaled \$572,969; estimated costs for all tasks under the contracts totaled about \$4.8 million. We found no basis to question the use of the three task order contracts for the work related to bilingual education research.

What Was the Extent of and Justification for Contracts Awarded to Small Business Administration 8(a) Firms?

Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with other agencies and let subcontracts to firms that are eligible to participate in the SBA 8(a) program. The program is intended to help the firms participate in government procurements. Regulations for these contracts do not require competition. Fifteen of the 34 contracts, valued at \$7.4 million, were awarded to small business firms under the SBA 8(a) program. Our review did not disclose a basis to question the justification for these contract awards.

Of the 15 SBA 8(a) contracts we reviewed, 14 were awarded with limited competition. In these awards three to five firms were considered for each contract. Contract awards were based on interviews with each contractor or a review of written material submitted by the firms. One SBA 8(a) contract was awarded noncompetitively in response to an unsolicited proposal. All contract awards were approved and made by SBA.

Were Any Contracts Awarded During the Last 2 Weeks of Fiscal Years 1982-85, and Were Normal Procurement Processes Followed?

Seventeen contracts were awarded within the last 2 weeks of fiscal years 1982-85. However, the contract award process for these contracts began several months earlier, and the major procurement processing steps prescribed in the department's procurement directive were followed. The directive provided minimum time frames for the contract award process, and the total time for awarding each of the 17 contracts was consistent with the directive.

Who Was Represented on Contract Proposal Review Panels, and Did Any Panelists Consistently Score Some Offerors' Proposals Either Low or High?

Technical review panels were used to evaluate proposals in 19 of the contract awards we examined. These panels consisted of three to seven members who were primarily Department of Education employees from OBEMLA, OPBE, and the National Institute of Education. Panels for the four multifunctional center contracts also included representatives from state and local education agencies. The Department of Education did not use outside peer reviewers because of a concern that they could gain access to information that could be used to their advantage in applying for other contracts.

We were unable to draw any conclusions about the panelists' patterns of scoring offerors' proposals because of the limited number of cases in which a panelist evaluated more than one proposal from a single offeror. Only 4 of the 59 people used on the panels served on more than one panel and had the opportunity to review more than one proposal from the same offeror.

What Was the Role of the Bilingual Research Planning Committee Before Its Termination in 1984?

The committee was created to coordinate bilingual education research activities as required by law. The committee was responsible for identifying research projects for funding and reviewing the projects' progress, including changes to them. In 1984 the legislative coordination requirement was revised, and the committee ceased functioning. Since 1984, OBEMLA has been required to coordinate bilingual education research by consulting with the National Institute of Education and the National Advisory and Coordinating Council on Bilingual Education. OBEMLA and OPBE officials told us they have continued to coordinate research undertaken since 1984.

Was It Appropriate to Modify the Terms of a Contract Request for Proposals to Operate Multifunctional Resource Centers After Its Issuance?

Two requests for proposals were issued to operate multifunctional centers and were later modified. Federal regulations allow modifications to requests for proposals any time before their due date. These modifications were made before the due dates for the proposals in accordance with the regulations. One request was modified to clarify the area to be served by one center; the other was modified to change the format for submission of the proposals and to extend the due date for proposals.

Did Funds Appropriated for Bilingual Education Lapse During Fiscal Years 1982 Through 1985?

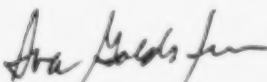
Funds appropriated for bilingual education that are not obligated at the end of the period covered by the appropriation lapse, are no longer available for use, and must be returned to the Treasury. Of the total \$618 million appropriated for bilingual education for fiscal years 1982-85, \$18.9 million was unobligated. However, only the \$2.1 million applicable to fiscal year 1982 lapsed. The remaining \$16.8 million, applicable to fiscal years 1983-85, was placed in an escrow account in accordance with court orders suspending any statutory lapse provisions pending the outcome of litigation involving the Department of Education's financial assistance for school desegregation. This litigation was not resolved as of February 27, 1987.

What Is the Status of Bid Protests Related to Contracts Awarded in 1986 for the Multifunctional Resource Centers and the National Clearinghouse for Bilingual Education?

Eight protests were filed with GAO in connection with contract awards for three multifunctional centers and the National Clearinghouse for Bilingual Education. Two were withdrawn by the protesting parties. GAO dismissed three others because they either did not provide the basis for the protest, were not submitted by one whose economic interest was affected, or were not filed in time. GAO decided that the remaining three protests were without merit.

We are sending copies of this report to the Secretary of Education and other interested parties, and will make copies available to others on request.

Sincerely yours,


for Richard L. Fogel
Assistant Comptroller General

Contents

Letter		1
--------	--	---

Appendix I		8
Bilingual Education:	Introduction	8
Research and	Background	9
Evaluation Contracts	Objectives, Scope, and Methodology	9
	Noncompetitive Contract Awards	11
	Contract Modifications	14
	Task Order Contracts	17
	SBA 8(a) Contracts	20
	Year-End Contracts	21
	Technical Review Panels	23
	Bilingual Research Planning Committee	25
	Transfer of Monitoring Responsibility	26
	Peer Reviews	27
	Modification of Request for Proposals	28
	Fund Lapse	29
	Status of Bid Protests	30

Appendix II		36
Contracts Reviewed:		
Contract Type, Original		
and Cumulative		
Amounts Funded (as of		
September 30, 1985)		

Appendix III		37
Comments From the		
Department of		
Education		

Table	Table I.1: Bilingual Education Funds Appropriated and Unobligated	30
-------	---	----

Contents

Abbreviations

GAO	General Accounting Office
NIE	National Institute of Education
OBEMLA	Office of Bilingual Education and Minority Languages Affairs
OPBE	Office of Planning, Budget and Evaluation
RFP	request for proposals
SBA	Small Business Administration

Bilingual Education: Research and Evaluation Contracts

Introduction

On September 19, 1985, the Chairman of the House Committee on Education and Labor asked us to examine contracts awarded by the Department of Education's Office of Bilingual Education and Minority Languages Affairs (OBEMLA) and Office of Planning, Budget and Evaluation (OPBE) relating to research and evaluation of bilingual education issues. We were also asked to examine six other department contracts, two for the National Clearinghouse on Bilingual Education and four relating to multifunctional resource centers.

Specifically, we were asked to respond to the following questions.

- What was the extent of and justification for noncompetitive contract awards?
- What were the original award amounts of contracts examined, how much were they increased by modification, how many contracts were modified without competition for work not provided for in the original contract, and should new contracts have been awarded for the additional work?
- Did OBEMLA and OPBE use task order contracts to fund bilingual research, and were their use in those cases appropriate?
- What was the extent of and justification for contracts awarded under the Small Business Administration's (SBA's) 8(a) program?
- How many contracts were awarded within the last 2 weeks of fiscal years 1982-85 and were normal procurement processing steps followed?
- What departments and offices were represented on department panels that reviewed bilingual research contract proposals, and did some panel members consistently assess some offerors' proposals either low or high?
- What was the role of the department's bilingual research planning committee before it was terminated in 1984?
- Have some bilingual research contracts been awarded by one department office and monitored by another office?
- How does the department use peer reviews in its research contracting process?
- Was it inappropriate for the department to modify the terms of a request for proposals (RFP) to operate multifunctional resource centers after it was issued?
- Have funds appropriated for bilingual education lapsed during fiscal years 1982-85?
- What is the status of bid protests filed with GAO by unsuccessful offerors in connection with OBEMLA's contracts for 16 multifunctional resource centers awarded during 1986, and the National Clearinghouse for Bilingual Education awarded in September 1986?

Except for two modifications to one contract (see p. 14), we did not identify any significant deficiencies.

Background

OBEMLA supports the development of local school programs that prepare children of limited English proficiency to enter an all-English language educational program. OBEMLA gives aid to state and local educational agencies (1) to train educational personnel and parents to serve limited-English-proficient children, (2) to build a state's capacity to improve educational services for such children, and (3) to assist districts that have refugee and immigrant children. OBEMLA also funds contracts providing for dissemination of information and research studies and evaluations related to bilingual education issues. Additionally, OPBE, which provides support for a wide range of department activities, funds contracts for evaluations and research of bilingual education issues.

The department's Grants and Contracts Service has administrative responsibility for awarding department contracts. As such, the service reviews planning documents and statements of work prepared by OBEMLA, OPBE, and other department offices; issues RFP's; analyzes offerors' proposals; negotiates with prospective contractors; and awards contracts.

Section 8(a) of the Small Business Act (15 U.S.C. 637(a) (1982)) and applicable regulations authorize the SBA to enter into contracts with other agencies and to let subcontracts to firms eligible for program participation. The 8(a) program is designed to increase the participation of small and minority-owned businesses in government procurement.

Objectives, Scope, and Methodology

To respond to its questions, the Committee asked us to review contracts awarded by OBEMLA and OPBE during fiscal years 1982-85 for bilingual education research, as well as certain other contracts. In total, we reviewed the award of or modifications to 34 contracts, which were valued at about \$37.8 million as of September 30, 1985. During fiscal years 1982-85, OBEMLA and OPBE awarded 25 research contracts relating to bilingual education pursuant to the Bilingual Education Act. These consisted of

- 15 contracts totaling \$7,384,642 awarded to SBA 8(a) firms, of which 14 were awarded with limited competition and 1 was awarded noncompetitively;

- 9 contracts, including 3 task order contracts, totaling \$11,192,987 awarded competitively to other than SBA 8(a) firms; and
- 1 contract for \$82,157 awarded on a sole-source basis in response to an unsolicited proposal.

Also, we reviewed modifications made during fiscal years 1982-85 to three of four bilingual research contracts awarded before fiscal year 1982. Department officials could not locate the file for one contract. The modifications to the three contracts we examined totaled \$246,300; the modified value of the contracts totaled \$2,555,955.

In addition to the contracts and contract modifications relating to bilingual education research, as requested by the Committee, we reviewed

- four contracts totaling \$6,415,514 that were awarded competitively during fiscal year 1983 to operate multifunctional centers,
- one contract for \$680,462 that was awarded with less than full and open competition during fiscal year 1985 to operate a National Clearinghouse on Bilingual Education, and
- modifications totaling about \$7.8 million made during fiscal years 1982-85 to a contract awarded in fiscal year 1980 for the National Clearinghouse on Bilingual Education. The value of the contract as modified totaled about \$9,459,214.

Also, at the Committee's request, we examined the circumstances surrounding the department's rejection of three proposals submitted in response to an RFP and the department's later issuance of a modified RFP covering the same issue. Finally, as requested, we determined the status of bid protests filed with GAO by unsuccessful offerors in connection with the department's contract awards for 16 multifunctional resource centers awarded during fiscal year 1986, and the National Clearinghouse for Bilingual Education awarded in September 1986. Multifunctional centers train people participating in programs to help those with limited English proficiency. The clearinghouse collects and analyzes information relating to bilingual education issues and distributes it to interested persons.

Our review did not include bilingual education research contracts awarded by the department's National Institute of Education (NIE) because a review of its contracting practices was the subject of an earlier GAO report, Procurement: National Institute of Education's Procurement Practices (GAO/HRD-86-1, Jan. 17, 1986).

Focusing on the Committee's questions, we reviewed the department's records and files relating to the contracts awarded by OBEMLA and OPBE and based our assessments on federal and department procurement regulations, policies, and procedures in effect at the time of the awards. We interviewed department contracting and program office personnel and, where appropriate, SBA officials regarding the SBA 8(a) small-business-awards process. We also interviewed department officials and reviewed pertinent records to determine whether any funds for bilingual education research had lapsed between fiscal years 1982 and 1985. Our audit work was performed at department headquarters in Washington, D.C., in accordance with generally accepted government auditing standards.

Noncompetitive Contract Awards

Question

What was the extent of and justification for noncompetitive contract awards?

Findings

Two of the awards we reviewed were awarded noncompetitively. One other contract, which was a follow-on to an existing contract, was awarded with less than full and open competition. Both noncompetitive contracts were awarded in response to unsolicited proposals; one was awarded to a small business firm under the SBA 8(a) program. We found no basis to question these awards.

Under federal procurement regulations then in force, noncompetitive procurements were justified if, because of unique capabilities, there was only one source capable of meeting minimum requirements (41 C.F.R. 1-3.107(a)(4)(1983)). The regulations provided further that a proposed noncompetitive procurement of an unsolicited proposal had to be unique, that is, it could not be available from another source or be similar to a planned competitive procurement (41 C.F.R. 1-4.910(a)(1983)). Contracts may be awarded through SBA's 8(a) program without regard to these regulations or others requiring competition.

In April 1982, a small business firm submitted an unsolicited proposal to the director of OBEMLA suggesting a study of the use of microcomputer

technology in bilingual education. After reviewing the proposal, OBEMLA concluded that it had merit and decided to award the contract.

Before the award of the noncompetitive contract, OBEMLA furnished the offeror a statement of work and cost estimate, and the offeror then submitted a revised proposal, which was evaluated by a technical review panel of three OBEMLA bilingual education specialists. (See p. 23 for a discussion on technical review panels.) The panel found the proposal generally unacceptable because it was too complex. OBEMLA's director, however, recommended to the contracting officer that the award be made if changes were made in contract scope and price. The department's Office of the General Counsel studied the proposed contract and found no legal impediment to awarding this contract under the SBA 8(a) program. The contracting officer negotiated a reduction in contract price from \$506,169 to \$271,057, and the contract was awarded on September 27, 1983.

A second contract for \$82,157 was awarded in September 1984 in response to an unsolicited proposal to analyze achievement data of minority language students in structured English immersion programs at two locations. (Immersion is an education program conducted in a student's second language but with a curriculum structured so that communication is at a level the child can understand.) OPBE, which awarded the contract, justified the noncompetitive award on the basis that the offeror's proposal would present data on a unique way of educating minority language children at these two sites.

The unsolicited proposal was submitted in August 1983, but funding for it was not available until April 1984. The department's bilingual research planning committee (see p. 25) reviewed the proposal and found it acceptable. The OPBE project officer prepared the required justification for a noncompetitive contract and submitted the proposal and justification to the department's Grants and Contracts Service. Initially, the contracting officer determined that the proposal did not meet the criteria for "uniqueness" because its proposed objective closely resembled that of another department contract in process.

The project officer appealed this determination and provided further justification showing that the proposal was based on examining a different approach to educating bilingual children than the existing contract. Based on this additional information, the contracting officer approved the procurement.

The third contract, which was to operate the National Clearinghouse on Bilingual Education, was awarded with less than full and open competition. This contract for \$680,462; was awarded on September 30, 1985, when the then existing clearinghouse contract expired; and covered a 6-month period from September 30, 1985, through March 31, 1986.

The justification cited for this award was a provision of the federal regulations (48 C.F.R. 6.302-1 (1985)), which authorizes agencies to award contracts with less than full and open competition if the supplies or services required by the agency are available from only one responsible source and no other type of supplies or services will satisfy agency requirements. Contracting officers are required to justify such contract awards in writing and to obtain the approval of the agency's competition advocate (an official responsible for promoting competition in an agency's procurements). Before awarding any proposed contract over \$10,000, including those with less than full and open competition, an agency must publish in the Commerce Business Daily a notice of the proposed contract.

In this case, the director of the Contracts Operations Division, Grants and Contracts Service, prepared a written justification stating, in part, that the continuing need for clearinghouse services could only be rendered by the incumbent contractor providing the services because certain work in progress could not be transferred to another contractor without undue interruption in services. The department's competition advocate approved the justification.

As required, on July 24, 1985, a notice was published in the Commerce Business Daily stating that the department intended to make an award to the incumbent clearinghouse contractor, who was thought to be the only source capable of meeting the department's requirements. Under the notice, other interested parties could provide notice of interest no later than 45 days from the date of the Commerce Business Daily publication. Two proposals were submitted to the department, one by the incumbent contractor and one by another offeror. A technical review panel found the latter's proposal technically unacceptable because of its heavy reliance on others to do major portions of the work and unrealistic assumptions concerning the ease and speed of transferring operations from the current contractor. One of the three panelists found the incumbent contractor's proposal technically acceptable, and the other two found it unacceptable but capable of being made acceptable through clarification without a major rewrite. The proposal was revised, and the contract was awarded to the incumbent contractor.

Contract Modifications

Question

What were the original award amounts of contracts examined, how much were they increased by modification, how many contracts were modified for work not provided for in the original contract, and should new contracts have been awarded for the additional work?

Findings

Originally the 34 contracts we reviewed totaled about \$14.7 million. Modifications to these contracts through September 30, 1985, had increased their value to about \$37.8 million. (Appendix II shows for each contract its type, original amount, and cumulative amount.)

Nine of the contracts we reviewed were modified for work not specifically covered in the original contracts. Modifications to eight of the nine contracts were, in our opinion, within the contracts' scope of work, and we have no basis to question the department's decisions to modify these contracts for the added work rather than acquire it through competition.

However, one contract, which expired on September 30, 1985, had been modified six times for work not provided for in the original contract, and in our opinion, two modifications were inappropriately based on an "option" clause, making the extensions tantamount to sole-source awards without properly justifying them as required by federal procurement regulations.

This contract was for the operation of the National Clearinghouse on Bilingual Education; it was originally awarded by NIE in 1980, and \$1.7 million was obligated to fund it. Six modifications to the contract increased its funded amount to about \$9.5 million. (In May 1981, oversight responsibility for the contract was transferred to OBEMLA, and the modifications to it since then were initiated by OBEMLA. (See page 26.)

The clearinghouse was responsible for (1) developing a data base of resources and studies in bilingual education; (2) providing user services, including referral services, and technical assistance; and (3) developing information products relating to bilingual education.

Four of the six contract modifications for work not specifically provided for in the original contract, in our view, were appropriate in that they

were within the contract's scope of work. One of the four modifications, made in June 1982 and costing \$77,184, was to explore the bilingual education needs of Native American and Pacific Island language groups and increase the clearinghouse's capacity to respond to the information and technical assistance needs of those groups.

Another modification, awarded in September 1982 at a cost of \$88,330, was to determine the information and technical assistance needs of state and local grantee personnel relative to implementing and evaluating bilingual education demonstration projects and distributing information on successful projects. Work under the modification was also intended to provide assistance in preparing several research study reports.

The remaining two modifications were made on September 18 and December 17, 1984. These modifications, which cost \$780,106, provided for identifying overlap with another clearinghouse in computerized bibliographic files, collecting and disseminating information on English as a second language, formalizing a plan to assess users' needs for proposed publications, and compiling and disseminating bilingual educational technology information.

Inasmuch as the objectives of these four modifications fall under the contract's general scope of work and do not change its basic nature, it was appropriate to provide these services through the contract modifications.

However, the other two of the six modifications to the clearinghouse contract, we believe, were inappropriate. These modifications related to two 1-year contract extensions. The contract originally was for a 3-year period beginning in September 1980 and provided that:

"The Government is granted the right and option to extend the period of this contract an additional twenty-four (24) months by the issuance of two (2) successive one (1) year extensions. This option, if exercised, will be evidenced by a written notice to the Contractor from the Contracting Officer at least ninety (90) days prior to the expiration date of the contract specifying the period of the extension and the tasks required. If the Government issues such notice the contractor will submit a continuation proposal to the Government not later than thirty (30) days prior to the expiration date of the contract. The proposal shall include a statement of work to be accomplished during the next twelve (12) months and a detailed cost estimate for performance of such work. Continued support beyond the initial three year period will be based upon the availability of funds, satisfactory performance by the Contractor, and the reasonableness and successful negotiation of these costs included in the Contractor's continuation proposal. If the Government exercises such option, the contract as extended shall be deemed to include this option provision, provided,

however, that the total duration of this contract including the exercise of any option under this clause, shall not exceed sixty (60) months."

The option provision was exercised in September 1983 and March 1984 to extend the contract for two additional 1-year periods at an added negotiated cost of about \$3.2 million.

In our opinion, however, the unpriced option clause of the contract did not provide a proper basis for extending the contract period. An option is an unaccepted offer to sell upon agreed terms that may be unilaterally accepted by the government. An option should be clear and definite and should not require further negotiation to work out essential terms. The essential terms of an option and the corresponding commitment on the contractor's part have to be established at the time the underlying contract is awarded. If they are not, there is no option for exercise by the government.¹ Use of the option provision requires that a price be established that the government may unilaterally elect to accept.²

Further, we believe that an agency's exercise of an unpriced contract option constitutes award of a contract on a sole-source basis,³ and inasmuch as the department did not justify the two 1-year extensions of the clearinghouse contract on a sole-source basis, we have no basis upon which to agree that a sole-source contract in this case was justified. In commenting on a draft of this report, the department's deputy under secretary for management told us that current awards do not contain provisions that would lead to such modifications. (See app. III.)

The changes to the other eight contracts were for (1) increasing the amount of work to be performed within the contracts' scope of work (e.g., increasing the number of schools or students to be studied) or (2) changes in written products (e.g., increasing the number of pages to be developed for use in classroom instruction). In our view, the modifications to these contracts were within the general scope of work required by the contracts and therefore were appropriate as contract modifications.⁴

¹See Department of Health and Human Services - Reconsideration, B-198911.3, Oct. 6, 1981, 81-2 C.P.D. 279.

²See Pacificon Productions, Inc., B-196371, July 22, 1980, 80-2 C.P.D. 58 at p. 6.

³See Varian Associates, Inc., B-208281, Feb. 16, 1983, 83-1 C.P.D. 160.

⁴See Indian and Native American Employment and Training Coalition, 64 Comp. Gen. 460 (1985).

The eight contracts were originally funded for about \$3.8 million. Unplanned modifications increased the total amount of the contracts by about \$1.3 million. Modifications to one of the contracts accounted for about \$0.9 million of the increase. This contract called for a study of the effects of immersion programs on minority language-speaking students, and the modifications included expanding the study to include other types of programs for minority language-speaking students and increasing the number of students in the study. Similarly, modifications to the other seven contracts were, in our view, within the contracts' scope of work, and their costs ranged from \$14,012 to \$237,515.

Task Order Contracts

Question

Did OBEMLA and OPBE use task order contracts to fund bilingual research, and was their use in those cases appropriate?

Findings

Task order contracts are characterized by a broadly worded statement of work providing for studies and analyses. During fiscal years 1982 through 1985 OPBE awarded three task order contracts under which studies relating to bilingual education were done. (OBEMLA awarded no such contracts during that period.) The three contracts were for (1) studies of department grants to state and local governments; (2) studies of educational quality and equal opportunity; and (3) data processing, planning, and technical analyses. Two contracts were awarded in fiscal year 1982, and one in fiscal year 1983.

Under these contracts, as of September 30, 1985, 60 tasks had been completed or were in process; 9 related to bilingual education and 51 related to other department activities. The total contract amount for the 60 tasks was \$4,778,695, including \$572,969 for the 9 bilingual tasks. We found no reason to question the use of task order contracts to fund the bilingual research in these cases.

Proposals for each contract were solicited through an RFP that was published in the Commerce Business Daily. Proposals received in response to the RFP were evaluated by technical review panels consisting of three to four OPBE staff members. No panel member served on more than one panel. In each case the contracts were awarded to the offerors whose

proposals were rated technically best or tied for best. Information on the three contracts is presented below.

Contract for Studies of Grants to
State and Local Governments

On September 30, 1982, OPBE awarded a task order contract for analytical studies related to department grants to state and local governments. The contract initially was for a 1-year period with provisions to extend it for two additional 1-year periods. The department extended the contract for both optional years, and over the 3-year period, 20 tasks were initiated, two of which related to bilingual education. The total contract cost was \$1,017,256. The costs for the two bilingual studies totaled \$57,941.

The RFP for the contract was issued on August 5, 1982. Proposals were received from two offerors, and OPBE's technical review panel determined both proposals to be within the competitive range. The Grants and Contracts Service contacted the offerors, asking for some clarifying information about their proposals and requesting that they submit their best and final offers. Best and final offers were reviewed by the technical review panel, and based on its recommendation, the contract was awarded to the offeror whose proposal was rated technically higher. This proposal also offered the lowest price.

The two bilingual education studies performed under this contract were: (1) an analysis of data on the extent and nature of services received by limited English-proficient students and (2) a study to identify the total population of school districts with limited English-proficient children and to determine the characteristics of districts that have not participated in bilingual education grants made to state and local governments. The first study was specifically identified in the contract, and inasmuch as the second study concerned grants to state and local governments, we believe it was within the contract's scope of work.

Contract for Studies of Educational
Quality and Equal Opportunity

Also, on September 30, 1982, OPBE awarded a task order contract providing for analysis and synthesis of research and evaluation studies and for development of models relating to educational quality and equality at the state, local, and federal levels for various groups, including minorities and women. This 1-year contract was extended, in accordance with the contract terms, for two additional 1-year periods. Over the 3-year contract period, 20 tasks were initiated, 5 of which related to bilingual education. Total contract reimbursement was \$1,620,061. The cost of the five bilingual studies was \$377,597.

Four proposals were submitted in response to an August 5, 1982, RFP for this contract. OPBE's technical review panel found two proposals unacceptable. One was unacceptable for several reasons, including a demonstration of a limited knowledge of available pertinent data bases and data analysis methods. The other unacceptable proposal was considered to have several weaknesses, including an inexperienced project director and an indication of a lack of knowledge of applicable legislation. The department contracting officer determined that the remaining two proposals were in the competitive range of the RFP. The technical review panel's assessment of these offerors' best and final offers characterized the technical scores of the two proposals as being "so close as to represent no real difference in technical quality." However, one offeror proposed a lower cost for a substantially larger number of performance days, and the panel recommended award to this offeror. The contract was awarded to the offeror recommended by the panel.

The five bilingual studies performed under this contract were:

- Development of information on the National Clearinghouse on Bilingual Education, including the similarities and differences between the clearinghouse's services and those provided by similar organizations.
- An assessment of the quality, utility, and efficiency of the operations and management of the clearinghouse. (Estimated cost for this and the preceding study totaled \$92,328.)
- Review of bilingual education evaluation, dissemination, and assessment centers. (Estimated cost, \$104,324.)
- Development of a complete set of bilingual education research studies and associated RFPs funded by the department since 1978. (Estimated cost, \$83,716.)
- A synthesis of the literature on major issues relevant to the education of minority language/limited English-proficient students. (Estimated cost, \$97,229.)

We believe the first three studies are included within one of the topics under the work statement entitled "Federal research, development, dissemination, data collection, and evaluation strategies." The clearinghouse and the evaluation, dissemination, and assessment centers are considered to be involved in federal strategies for information dissemination and evaluation of bilingual education programs. The latter two studies we believe would be included in the contract's broad work statement providing for analysis and synthesis of research findings, evaluation studies, and literature research.

Contract for Data Processing,
Planning, and Technical Analyses

On June 30, 1983, OPBE awarded a task order contract for data processing and technical support. The contract was for an initial 6-month period ending December 31, 1983, with options for OPBE to extend it for two 1-year periods. OPBE exercised the options for both years, and the contractor undertook 20 tasks, 2 of which related to bilingual education. Total contract cost was \$2,141,378. The cost of the two bilingual studies was \$137,431.

The contract was awarded pursuant to an RFP issued on March 25, 1983. Two offerors submitted proposals, of which only one was considered technically acceptable by a technical review panel composed of four OPBE staff members. The panel cited several problems with the unacceptable proposal, including a lack of understanding of OPBE's needs, a lack of knowledge of the education policy issues as evidenced by the proposal's overemphasis on one issue (handicapped discrimination), and a lack of breadth of experience by project staff. The award was made to the offeror who submitted the acceptable proposal.

The two bilingual tasks under this contract involved (1) an analysis of previously developed data concerning English language proficiency within the United States and (2) an estimation of the number of limited English-proficient children as identified by 1980 Census data.

SBA 8(a) Contracts

Question

What was the extent of and justification for contracts awarded under the SBA 8(a) program?

Findings

OBEMLA and OPBE awarded 15 bilingual education research contracts totaling \$7,384,642 to SBA 8(a) firms during fiscal years 1982-85. Thirteen of the contracts were funded by OBEMLA, and two by OPBE. Fourteen of these were awarded after limited competition, and one was awarded noncompetitively. (The noncompetitively awarded contract was discussed on p. 11.)

The SBA 8(a) program is intended to help eligible small firms become independently competitive. Under section 8(a) of the Small Business Act (15 U.S.C. 637(a)(1982)), federal agencies contract for goods and services with SBA, which in turn subcontracts the actual performance of the

contract to small businesses owned and controlled by socially and economically disadvantaged individuals.

The department established annual goals for contract awards to SBA 8(a) firms expressed as a percentage of the total amount of the agency's contract awards. The department's Office of Small and Disadvantaged Business Utilization helps department offices, including OBEMLA and OPBE, identify planned contracts that might be awarded to qualified 8(a) firms. The director of the Office of Small and Disadvantaged Business Utilization told us that his office (1) maintains a list of qualified 8(a) firms with known expertise in different subject matters and (2) reviews annual procurement plans of other department offices to identify proposed contracts that appear to have potential for award to the 8(a) firms.

Before the 14 SBA 8(a) contracts were awarded, three to five prospective contractors were identified for each contract.⁵ Names of the prospective firms were then provided to the Office of Small and Disadvantaged Utilization and SBA for approval.

Prospective contractors for 10 of the 14 contracts were interviewed by the department's Grants and Contracts Service and representatives from OBEMLA or OPBE to determine the best qualified firm. Such determinations for the other four contracts, which involved preparing bilingual educational materials, were based instead on evaluations of written products submitted by the prospective contractors. Final contractor selection for the 14 contracts was made by either OBEMLA or OPBE officials, depending on which office funded the contracts, with concurrence of the Grants and Contracts Service.

Year-End Contracts

Question

How many contracts were awarded within the last 2 weeks of fiscal years 1982-85, and were normal procurement processing steps followed?

⁵For all but one of the contracts, the prospective firms were identified by OBEMLA and OPBE. Prospective firms for the one contract were identified by the Office of Small and Disadvantaged Business Utilization in accordance with an OBEMLA procedure established in June 1985 that provided that office, rather than OBEMLA, would identify prospective firms for OBEMLA SBA 8(a) awards.

Findings

Seventeen contracts, including four to operate the multifunctional centers and one to operate the National Clearinghouse on Bilingual Education, were awarded during the last 2 weeks of a fiscal year. The four multifunctional center contracts totaled about \$6.4 million; the clearinghouse contract, \$680,462; and the remaining 12 contracts, about \$8.3 million. The procurement process, however, for all 17 of the year-end contracts started several months earlier, and the major procurement processing steps prescribed by the department's procurement directive were followed for these contracts.

In January 1981, the department issued a directive establishing departmental policy and procedures for timely and effective planning of procurement. The directive established major steps to be performed in contract awards and minimum time frames for performing those steps. For competitive awards the major steps listed in the directive were (1) submitting a draft statement of work to the Grants and Contracts Service, (2) issuing an RFP, (3) examining contractors' proposals by the technical review panel, and (4) negotiating with prospective contractors. According to the directive, not less than 165 calendar days were to elapse between submission of the draft statement of work and contract award.

The major steps for SBA 8(a) contracts were submitting a draft statement of work, interviewing potential contractors, and negotiating the contract. According to the directive not less than 113 calendar days were to elapse between the time the project officer submitted the draft work statement and the contract award.

Ten of the 17 year-end contract awards were competitively awarded, including the contracts for the multifunctional centers. The National Clearinghouse on Bilingual Education contract had less than full and open competition (minimum processing time for such contracts was 107 days). Another contract was awarded on the basis of an unsolicited proposal. The other five contracts were SBA 8(a) contracts, one of which was also awarded on the basis of an unsolicited proposal. The contract files contained evidence that the major procurement processing steps were completed for all contracts except for the two awarded as unsolicited proposals. The procurement directive does not apply to these contracts. The elapsed procurement processing time for all 17 contracts equaled or exceeded the calendar days specified by the department's procurement directive.

Technical Review Panels

Question

What departments and offices were represented on department panels that reviewed bilingual education research contract proposals, and did some panel members consistently assess some offerors' proposals either low or high?

Findings

Technical review panels were used to evaluate proposals in the award of 19 contracts we examined, including all the competitively awarded contracts. Except in four cases, the technical review panels were made up entirely of department employees. These four cases involved technical review panels for the award of the four multifunctional center contracts. Ten of the 20 panelists for these contracts were from state or local education agencies because, according to the contracts' project officer, not enough department panelists were available.

A total of 59 persons served on technical review panels, but only 4 panelists served on more than one panel and had an opportunity to review more than one proposal from the same offeror. Two of the four panelists served on a panel whose scores were coded, and their scores could not be determined from the files we reviewed. Therefore, there were only two panelists for whom we were able to compare their scores on different proposals from a single offeror. However, because these panelists reviewed only two proposals from any single offeror, there was an insufficient basis for determining their scoring tendencies.

Before April 1984, department regulations required that, in connection with competitive contracts, technical evaluators review proposals in accordance with criteria in the RFP. Department regulations did not, however, specify how technical evaluators would be selected. Promulgation of the Federal Acquisition Regulation in 1984 made the department's regulations obsolete for contracts entered into after that date and as of February 25, 1987, the department was preparing new regulations. Therefore, since April 1984 there has been no department regulatory requirement to use technical evaluators. According to department contracting officials, the department continues to use technical review panels for the award of competitive contracts, and the use of panels for SBA 8(a) contracts was left to the discretion of the funding program

office and the Grants and Contracts Service. Panel members, they said, were selected by the organization funding the contract and were approved by the Grants and Contracts Service.

For the 19 contracts that used technical review panels, 11 were awarded by OBEMLA and 8 by OPBE. Four of the 11 OBEMLA contracts were for multifunctional centers. The four panels for these center contracts consisted of 5 members each, or a total of 20 members. We could not identify one member's organizational affiliations. Of the remaining 19 members, 10 were from state or local education agencies, 4 from NIE, 3 from the department's Office of Education Research and Improvement, and 2 from its Office of Intergovernmental and Interagency Affairs. Each panel included a member from NIE and two or three members from state or local agencies. The remainder of the membership for each of the four panels came from one of the other two department offices.

The number of panelists on the remaining seven OBEMLA contracts varied from 3 to 6 and involved a total of 28 persons. All seven panels included OBEMLA representatives and were composed as follows:

- two three-member panels consisted entirely of OBEMLA representatives;
- a second panel consisted of two persons each from OBEMLA and OPBE, and one person each from NIE and the Office of Education Research and Improvement; and
- each of the remaining four panels consisted of a person from OBEMLA and the department's Office of Migrant Education, and two persons from the department's Teacher Corps Program.⁶

The number of panelists on the eight OPBE contracts varied from 3 to 7, and involved a total of 37 persons. OPBE staff accounted for 24 of the 37 persons, and all panels included 2 to 4 OPBE representatives. Other panel members represented NIE, OBEMLA, and the National Center for Education Statistics.

One of the two panelists whose scores we were able to compare for two proposals from a single offeror was from OPBE. This panelist scored the two proposals above average relative to the panels' averaged scores.

⁶The Teacher Corps Program was to strengthen educational opportunities of children in areas having concentrations of low-income families by encouraging colleges and universities to broaden their programs of teacher preparation and encouraging institutions of higher education and local education agencies to improve programs of training and retraining teachers and teachers' aides. The program was consolidated with about 37 other categorical programs in 1981 by title V of the Omnibus Budget Reconciliation Act of 1981-subtitle D (Public Law 97-35).

The other panelist, who was from OBEMLA, served on four panels and reviewed two different proposals from each of four offerors. This panelist's scores for

- four proposals, two each from two offerors, were lower than the panel's averaged scores;
 - two other proposals submitted by another offeror were about the same as the panel's averaged scores on one and lower than the panel's averaged scores on the other; and
 - the other two proposals from the remaining offeror were lower than the panel's average on one and higher on the other.
-

Bilingual Research Planning Committee

Question

What was the role of the department's bilingual research planning committee before it was terminated in 1984?

Findings

The Bilingual Education Act, as amended by the Education Amendments of 1978, authorized the Office of Education⁷ to conduct bilingual education research in certain areas (Public Law 95-561, sec. 742 (1978)). The act required that the research activities of NIE, OBEMLA, the National Center for Education Statistics, and other agencies be coordinated in order to develop a national research program for bilingual education. To carry out this requirement, the department established a bilingual research planning committee. Committee members included representatives from NIE, the National Center for Education Statistics, OBEMLA, and OPBE. The committee was chaired by the director of OBEMLA. The Bilingual Education Act's coordination requirement was revised by the Education Amendments of 1984 (Public Law 98-511). The 1984 amendments require consultation among the OBEMLA director, the director of NIE, and the National Advisory and Coordinating Council on Bilingual Education to insure that research activities are complementary and not duplicative.

⁷The Department of Education was established by the Congress in October 1979 (Public Law 96-88, sec. 201, 20 U.S.C. 3411 (1982)). Before that time, the federal education function was administered by the Office of Education within the former Department of Health, Education, and Welfare.

OBEMLA and OPBE officials told us that to their recollection, no official action was taken to abolish the bilingual research planning committee, but the committee gradually ceased functioning in 1984. These officials said that minutes or written records of the committee's meetings or decisions were not maintained.

We discussed the committee's activities with the former committee secretary. He said that the committee did not adopt a formal charter, but did prepare a 5-year plan covering fiscal years 1979-83 identifying proposed research projects intended to respond to questions and concerns stated in the Education Amendments of 1978. Each year in June or July, he said, the committee met to develop plans and allocate funding for specific research projects. The committee also assigned responsibility for the studies to the department agencies. He said task forces, appointed by the committee, designed the proposed studies and prepared work statements for them. The committee, according to the former secretary, periodically assessed the progress of ongoing research projects. In June 1984, the Secretary of Education directed OBEMLA and OPBE to cooperatively administer their bilingual education research and evaluation activities and, as appropriate, to consult with the NIE director and the administrator of the National Center for Education Statistics.

OBEMLA and OPBE officials told us that by 1984 the committee's role in allocating research funds had become less significant because an increasing proportion of total research funds were already committed to multiyear research and evaluation projects initiated in prior years. They said that ongoing contracts for current research and evaluation had been planned under the auspices of the committee before it stopped operating in 1984, and that the few research and evaluation projects undertaken since 1984 had been coordinated between OPBE and OBEMLA.

Transfer of Monitoring Responsibility

Question

Have some bilingual research contracts been awarded by one department office and monitored by another office?

Findings

Only one of the contracts covered in our review was awarded by one department office and monitored by another. This was a contract for the National Clearinghouse for Bilingual Education which was awarded in 1980 by NIE and jointly funded by OBEMLA and NIE. (Although we did not review the award of the contract as it was outside the period of our review, we reviewed later modifications to it.) Responsibility for administration of the contract was transferred to OBEMLA in 1981, while funding for it continued to be shared by OBEMLA and NIE pursuant to an August 1980 memorandum of understanding between the directors of NIE and OBEMLA and the assistant secretary for education research and improvement.

Except for the clearinghouse contract, we did not find evidence in the contract files we examined that any of the other contracts were being monitored by a department office other than the one that awarded the contract. However, the former secretary of the bilingual research planning committee told us that OBEMLA staff had participated in monitoring studies funded by department agencies other than OBEMLA. These monitoring activities included attending status meetings, discussing work progress with project officers, and reviewing drafts of contractor products.

Peer Reviews

Question

How does the department use peer reviews in its research contracting process?

Findings

We did not find any evidence in the contract files we reviewed that outside peer reviewers were used in the award of contracts. OPBE and OBEMLA officials told us that the department did not use a formal peer review system in the context of having outside persons review bilingual education research and development proposals. They said outside reviewers were not used so that the independence and objectivity of the bilingual education process would not be compromised by allowing reviewers to gain access to information that could be used to their advantage in trying to gain future contracts.

Modification of Request for Proposals

Question	Was it inappropriate for the department to modify the terms of an RFP to operate multifunctional resource centers after it was issued?
----------	--

Findings	Federal regulations authorize agencies to modify RFPs for various reasons before the date set for receipt of any proposals. The department issued RFPs for contracts to design, develop, and operate 16 multifunctional resource centers in various geographical locations. Consistent with the federal regulations, the department modified the RFPs before the due date for the proposals. The modifications involved clarifying the geographical area of a center.
----------	---

Federal regulations then in effect provide that:

"After issuance of a solicitation, but before the date set for receipt of proposals, it may be necessary to (1) make changes to the solicitation, including, but not limited to, significant changes in quantity, specifications, or delivery schedules, (2) correct defects or ambiguities, or (3) change the closing date for receipt of proposals. . . ." (48 C.F.R. 15.410(a) (1985))

On January 28, 1986, the department issued an RFP soliciting proposals for the 16 multifunctional resource centers by March 28, 1986. On January 30, 1986, the department modified the RFP to clarify a description of a geographical area to be served by one of the centers.

Proposals received in response to the RFP were reviewed and scored by technical review panels based on criteria contained in the RFP. Contracts were awarded for 13 of the 16 multifunctional resource centers. The panels found the proposals for the other three centers unacceptable for various reasons. Among the reasons given were that the proposals (1) lacked cohesiveness and adequate demonstration of understanding the projects' purpose and objectives, (2) lacked a project director with the necessary expertise, or (3) contained vague plans for making required assessments.

On May 27, 1986, the department issued a second RFP inviting contract proposals for the three multifunctional resource centers by July 25, 1986. On July 17, the department amended the RFP to extend the July 25

due date to September 9, 1986, and to revise instructions regarding organization of the proposals. Inasmuch as the July 17 amendment preceded the original July 25 due date for proposals, this amendment was consistent with the applicable federal regulations. Two or three offers were received on each of the three centers, and after reviews by technical review panels, the three contracts were awarded on December 31, 1986.

Fund Lapse

Question

Have funds appropriated for bilingual education lapsed during fiscal years 1982-85?

Findings

Funds appropriated for bilingual education were available for obligation for specified time periods. Unobligated balances remaining at the end of the appropriation period lapse and are no longer available for obligation or disbursement. Of the total of about \$618 million appropriated for bilingual education for fiscal years 1982 through 1985, \$603.5 million was available for obligation for 1 year, and the remaining \$14.7 million was available for more than 1 year. At the end of the 4-year period, a total of \$18.9 million was unobligated. However, only \$2.1 million, applicable to the fiscal year 1982 appropriation of \$138 million, lapsed. The remaining \$16.8 million for fiscal years 1983-85 was placed in an escrow account in accordance with several court orders suspending any statutory lapse provisions pending the outcome of litigation involving the department's financial assistance for school desegregation. The court orders were issued in connection with litigation involving the federal government and the Chicago Board of Education and applied to all funds appropriated to the department that might otherwise lapse.

Department officials attributed the year-end lapse of some bilingual education funds to the department's system for controlling expenditures and safeguarding against overobligation of funds and to the lack of meritorious proposals.

OBEMLA's executive officer explained that for purposes of accounting control, funds appropriated for bilingual education are allotted annually to about 20 accounts, and at the end of each fiscal year, the department attempts to consolidate any unobligated amounts in these accounts for

use in funding additional grants or contracts. However, he explained that the balances in these accounts sometimes lapse because they cannot be consolidated and obligated before the end of the year or because the department program directors believe that all worthy grant applications have been funded and any unfunded applications do not merit funding.

The unobligated bilingual education funds for fiscal years 1983-85 and the amounts appropriated for those years are shown in table I.1.

Table I.1: Bilingual Education Funds
Appropriated and Unobligated

Dollars in thousands		
Fiscal year	Unobligated amount	Bilingual education funds appropriated
1983	\$4,148	\$138,057
1984	2,228	169,183
1985	10,428	172,951
Total	\$16,804	\$480,191

Pursuant to a September 27, 1983, and subsequent court orders issued by the District Court for the Northern District of Illinois (Eastern Division), the unobligated funds totaling about \$16.8 million for fiscal years 1983-85 were placed into an escrow account instead of lapsing.

The court case involves federal funding for school desegregation programs, and as part of the judicial proceedings, the district court entered an order on September 27, 1983, suspending the operation of any statutory lapse provisions that require unobligated funds of the department to be returned to the U.S. Treasury at the end of the fiscal year. The court ordered the United States to accomplish this suspension by creating an escrow account consisting of all remaining unobligated appropriation balances subject to the court order to be expended only as directed or permitted by further order of the court. As of February 27, 1987, the court had released about \$3.3 million of the escrowed funds for use in bilingual education programs. The balance of the funds remain in escrow.

Status of Bid Protests

Question

What is the status of bid protests filed with GAO by unsuccessful offerors in connection with OBEMLA's contracts for 16 multifunctional

resource centers awarded during fiscal year 1986, and the National Clearinghouse for Bilingual Education awarded in September 1986?

Findings

Statutory and regulatory procedures define the manner in which government contract awards are to be made. Competitors who believe that contracting requirements have not have been met in any particular instance may protest to GAO for a determination.

Three bid protests were submitted to GAO regarding the 1986 contract awards to operate three multifunctional resource centers, and five protests were submitted in connection with the September 1986 contract award for the National Clearinghouse for Bilingual Education. Of the eight protests, three were dismissed by GAO for technical deficiencies, two were withdrawn, and three were found by GAO to be without merit.

Protests on Multifunctional Centers Awards

Of the three protests for the multifunctional resource centers, one was dismissed because the protesting party did not state a basis for the protest as required by GAO regulations, and the other two protests were denied because they were found to be without merit.

In the first denial, it was alleged that the department unreasonably excluded the protestor from the competitive range of bidders and failed to conduct meaningful discussions with the protestor. It also questioned the department's conduct of the evaluation process.

The protestor's claim that it was improperly excluded from the competitive range and that the department failed to conduct proper negotiations was based on a department letter advising the protestor that it was not in the competitive range. Because the letter did not state that the protestor's proposal was technically unacceptable, the protestor believed that, under federal acquisition regulations, "there was doubt as to whether its proposal was in the competitive range." (The only other proposal, which was submitted by another offeror, was found to be technically acceptable.)

GAO's review of the protest showed that four of five department panelists who reviewed the protestor's proposal found it technically unacceptable; one panelist found it technically unacceptable but capable of being made acceptable. The panel's recommendation was that the protestor's proposal be found technically unacceptable. This recommendation was accepted by the contracting officer's technical representative.

The contracting officer adopted the findings of the panel and the technical representative and determined that the protestor's proposal was technically unacceptable and not capable of being made acceptable without major revisions and therefore was not in the competitive range.

GAO decided that the contracting officer's determination was reasonable. According to the decision, such a determination provides the basis for exclusion from the competitive range, and there is no requirement that a specific statement of technical unacceptability be included in a preaward notice to an offeror whose proposal has been determined not to be in the competitive range, and the absence of such a statement does not itself give rise to any doubt, in a legal sense, as to whether the proposal was in the competitive range. Also, GAO's decision stated that the department had no obligation to enter into discussions with the protestor. (See Louisiana Department of Education, B-222591.2, Oct. 9, 1986).

The protestor also objected, in general terms, to the entire evaluation process, suggesting that the department's manner of conducting this and other similar procurements evidences bias on the part of its evaluators. According to GAO's decision, the critical tests for determining bias in the evaluation of proposals is whether all offerors in the competition are treated fairly and equally. The protestor has the burden of affirmatively proving its case, and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.

In this case, GAO's decision said that the protestor was attempting to show that its low evaluation score must have resulted from bias because it did not accurately represent the proposal's merits. However, according to the decision, since the contracting officer reasonably had determined that the protestor's proposal was technically unacceptable, and the protestor had not submitted independent evidence of bias, the allegation was mere speculation that did not meet the protestor's burden of affirmatively proving its case. Moreover, while the protestor specifically contended that one panel member in particular had a bias against it, GAO's review of the evaluation showed that this individual did not participate in any way in the evaluation of the proposals.

In the second denial the protestor alleged that (1) it was not advised of any deficiencies in its initial proposal, (2) no bargaining was conducted during the negotiation process, (3) the department failed to adhere to the RFP evaluation criteria, (4) it should have been awarded the contract because its proposal offered the lowest cost, and (5) the department

improperly disclosed technical information to a competitor (technical transfusion). (See Northwest Regional Educational Laboratory, B-222591.3, Jan. 21, 1987.)

The protestor's assertion that it was not advised of any deficiencies in its initial proposal was based primarily on the fact that it viewed the tone of telephone contacts with the department as complimentary, and that its proposal was included in the competitive range with no specific mention of deficiencies. GAO's ruling was that although meaningful written or oral discussions must be conducted with all offerors in the competitive range, offerors are not entitled to all-encompassing discussions. Rather, agencies are only required to lead offerors into areas of their proposals needing amplification. GAO found that meaningful discussions had been conducted with the protestor because the department had sent a list of detailed questions advising the protestor of the areas of its proposal with which the department was concerned, and the protestor was given an opportunity to revise its proposal in response to those questions.

Regarding the protestor's assertion that no bargaining was conducted, GAO's decision said that there is no requirement for bargaining. Nevertheless, the contracting officer gave all three offerors a specific list of agency concerns with their initial proposals and requested best and final offers from each offeror. GAO ruled that this, in itself, was sufficient to meet the regulatory requirement for meaningful written or oral discussions.

The protestor's assertion that the department failed to adhere to the RFP evaluation criteria was based solely on the fact that best and final offers were not specifically rescored. However, GAO ruled that there is no requirement that an agency formally rescore best and final offers. In this case the contracting officer's technical representative and four of the five original panel members reviewed the offeror's best and final offers and determined the winning contractor's proposal to be substantially superior to the protestor's proposal.

The protestor's assertion that it should have been awarded the contract because it provided the lowest cost proposal was predicated on its inference that its proposal was technically equal to the successful offeror's proposal. However, as indicated above, such was not the case, and the department was entitled to determine that the technically superior proposal submitted by the successful offeror was worth its additional cost.

Finally, the protestor's assertion that the department engaged in a prohibited technical transfusion was based on the fact that personnel from the successful offeror met with the department personnel during negotiations. The department stated that the meetings concerned other unrelated matters and that the only germane occurrence was the physical handing of written questions to the successful offeror.

Federal regulations (48 C.F.R. 15.610(d)(2) 1985) prohibit contracting officers from engaging in technical transfusion, defined as government disclosure of technical information pertaining to a proposal that results in improvement of a competitor's proposal. To establish that technical transfusion has occurred, the record must establish that the contracting agency either directly or indirectly disclosed one offeror's technical approach to another offeror. According to the GAO decision, the protestor had provided no evidence of any such disclosure, nor was there any evidence in the record.

Bid Protests on the National
Clearinghouse on Bilingual
Education Award

Of the five bid protests submitted to GAO regarding the award of a September 1986 contract for the National Clearinghouse for Bilingual Education, two were withdrawn without explanation, two were dismissed by GAO, and one was denied on its merits. One protest was dismissed because it was not filed by an actual or prospective offeror whose economic interest would be affected by the award or failure to award, as required by GAO regulations. The second protest, which concerned a refusal by the department to accept an offer that was submitted late, was dismissed because the protest was received late at GAO. GAO regulations require that a protest be filed not more than 10 days after the basis for protest becomes known. This protest was filed 21 days after its basis became known.

The fifth protestor, whose protest was denied, contended that the department failed to furnish essential information regarding an amendment to the RFP concerning user charges for on-line computer searches. The protestor complained that it had learned of the amendment for the first time at a debriefing held by the department about 1 month after the contract award.

The protestor's proposal was excluded from the competitive range because (1) the protestor had little previous experience with the bilingual community and did not demonstrate the capacity to work with the intended users of the clearinghouse; (2) the protestor's proposed staff did not have the required experience or background; (3) the protestor

did not include procedures and a schedule for the transfer of clearinghouse activities as required by the RFP; (4) the protestor did not describe plans and procedures for data base development; and (5) contrary to the intent of the RFP, the protestor's proposal was oriented more to research than to actual users of the clearinghouse. The department notified the protestor in writing that its proposal had been determined to be outside the competitive range, stating as the reason the proposal's weaknesses in technical quality, conceptualization, personnel, organization and management, and facilities and equipment.

GAO's decision stated that the RFP amendment as it pertains to the department's clarification concerning user charges for on-line computer searches was a minor cost matter unrelated to the major technical deficiencies for which the protestor was excluded from the competitive range. An agency is not required, according to the decision, to issue a solicitation amendment to an offeror no longer in the competitive range where the subject matter of the amendment is not directly related to the reasons the agency excluded the offeror from the competitive range. (See THE MAXIMA Corporation, B-222313.6, Jan. 2, 1987.)

Contracts Reviewed: Contract Type, Original and Cumulative Amounts Funded (as of September 30, 1985)

Contract title	Type of contract	Original contract amount funded	Cumulative contract amount funded
Evaluation: Title 7 Programs	Competitive	\$615,000	\$1,519,571
Synthesis: Program Effectiveness	Competitive	203,089	396,097
Evaluation Assistance Center (East)	Competitive	500,000	500,000
Multifunctional Center: Area 7	Competitive	529,167	1,697,887
Multifunctional Center: Area 13	Competitive	235,334	723,034
Multifunctional Center: Area 15	Competitive	416,490	1,244,313
Multifunctional Center: Area 16	Competitive	872,412	2,750,280
Analysis Center: Quality, Equality	Competitive	209,856	1,620,061
Analysis Center: State/local grants	Competitive	242,933	1,017,256
Processing, Technical Assistance	Competitive	348,337	2,141,378
Longitudinal Evaluation of Services	Competitive	1,488,007	4,133,138
Identify Students Needing Program ^a	Competitive	130,394	403,803
Evaluation Procedures: Title 7	Competitive	124,551	243,938
Longitudinal Study: Native Americans	Competitive	438,591	438,591
Educational Preferences of Parents	Competitive	500,000	694,822
National Clearinghouse: 1980 ^a	Competitive	1,672,900	9,459,214
Teacher Language Skills Survey	8(a)	443,610	640,287
Instructional Materials Area 1 ^a	8(a)	361,209	663,062
Instructional Materials Area 2 ^a	8(a)	593,716	616,409
Instructional Materials Area 3 ^a	8(a)	260,058	469,668
Instructional Materials Area 4 ^a	8(a)	559,215	582,093
Mainstreamed Students	8(a)	93,096	93,096
Native Americans/Alaskan Title 7	8(a)	167,143	167,143
Training Materials: Development	8(a)	271,057	271,057
State-of-the-art Technology	8(a)	130,170	130,170
Approaches to Improving Services ^a	8(a)	199,067	683,481
Hawaii/Pacific Services	8(a)	159,953	159,953
Title 7 State Activities	8(a)	195,433	195,433
Recent Immigrants	8(a)	170,940	170,940
Special Issues Analysis	8(a)	174,132	174,132
Longitudinal: Immersion Programs ^a	8(a)	1,061,715	2,362,215
Secondary Students ^a	8(a)	615,790	645,790
Longitudinal: Structured English	Noncompetitive	82,157	82,157
National Clearinghouse: 1985	Noncompetitive	680,462	680,462
Total		\$14,745,984	\$37,770,931

^aContracts with modifications for work not included in the original award.

Comments From the Department of Education



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE DEPUTY UNDER SECRETARY FOR MANAGEMENT

APR 10 1987

Mr. Richard L. Fogel
Assistant Comptroller General
Human Resources Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

We have reviewed the draft report, "Bilingual Education: Research and Education Contracts." We are pleased that, except for one contract, your staff did not find any significant deficiencies in the way the Department of Education awarded and modified the contracts examined in your review.

Enclosed for your consideration is a list of minor technical corrections to the report. We would also like to comment on the one contract cited for deficiencies. Current awards do not contain provisions that would lead to modifications such as those cited in the report.

We appreciate the opportunity to comment. Questions regarding this response may be directed to Bill Sullivan, Director, Contracts Division, at 712-2514.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary M. Rose".

Mary M. Rose
Deputy Under Secretary
for Management

Enclosure

400 MARYLAND AVE. S.W. WASHINGTON, D.C. 20540

Requests for copies of GAO reports should be sent to:

U.S. General Accounting Office
Post Office Box 6015
Gaithersburg, Maryland 20877

Telephone 202-275-6241

The first five copies of each report are free. Additional copies are \$2.00 each.

There is a 25% discount on orders for 100 or more copies mailed to a single address.

Orders must be prepaid by cash or by check or money order made out to the Superintendent of Documents.